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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT and WALTER BRIEHL,
Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State,
Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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Interest of *Amicus*

The American Civil Liberties Union, appearing herein with the consent of all the parties filed with the Clerk of this Court, is a non-profit, non-partisan organization dedicated to the advancement of the constitutional rights of American citizens.

Amicus believes that these cases involve an abridgment of one of the most fundamental of those rights, the right of free movement.

Amicus also believes these cases disclose an abuse of the power vested in the federal government which represents a threat to all of those rights.

These cases are concerned with the denial of a passport to American citizens because of their alleged sympathy with the Communist Party and their refusal to take an oath with respect to present or past membership in it. *Amicus*

has no sympathy with the aims and objectives of the Communist Party or movement but believes that the Passport Regulations have the improper effect of making mere membership therein or association therewith, past or present, a basis for restriction on the right of free movement.

Statement of the Case

The facts relied upon by *amicus* are set forth in the Petitioners' brief and the Record before this Court. In the case of Rockwell Kent they involve the denial of a passport because of the opinion of the Department of State that he had "a consistent and prolonged adherence to the Communist Party line" and the failure of the Department to process his appeal because of his refusal to take an oath concerning his past or present membership in the Communist Party. In the case of Walter Briehl, the same action was taken. The stated reasons for the tentative denial are summarized in this brief.

This brief is submitted in support of the Petitioners herein on two issues: first, whether the right of free movement is a right protected by the Constitution and, second, whether the action taken by Secretary of State in failing to issue the passports is an abuse of the power vested in the federal government.

Amicus supports the further points made in the able brief submitted by the Petitioners. No purpose would be served by repeating them here. *Amicus* believes that the points herein presented are of grave importance to civil liberties and of controlling significance in the instant cases. *Amicus* urges the Court to reverse the judgments below.

POINT I

There is a right of free movement which is as fundamental, as firmly embedded in American history and as fully protected by the Constitution as any of the rights specifically enumerated therein.

Amicus emphasizes the nature and importance of the particular right which is primarily involved in these cases, "the right of free movement."

In cases involving the right of free speech, particularly in *Dennis* v. *United States*, 341 U. S. 494 (1951), this Court has pointed out that judicial solution of the vexing problem presented by such cases is necessarily arrived at by the process of balancing conflicting interests. This process cannot be reduced to a formula but, to the extent that it can be placed in words, *amicus* believes that it is to be found in the words of Judge Learned Hand which were repeated and adopted by Chief Justice Vinson in the majority opinion of this Court in the *Dennis* case:

> "* * * the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The conflicting interests in the *Dennis* case were different from those in the cases now before this Court. In *Dennis*, the "evil" under consideration was the violent overthrow by the Communist Party of the federal government; here, the "evil" would seem to be interference by the Communist Party with the conduct of foreign affairs. In *Dennis*, the means used to overcome the evil was punishment, by fine, imprisonment or both, of any person convicted of an actual act of advocacy of violent revolution; here, the means used to overcome the evil appears to be refusal of a passport to any American citizen suspected by the Secretary of State of being likely to engage in activities abroad in furtherance of the Communist movement. Finally, in the *Dennis* case, the right involved was that of free speech. Here, it is "the right of free movement."

The process, however, of balancing conflicting interests, which was used in the *Dennis* case is applicable to the present cases. Indeed, the process would seem to have been used by the majority of the court below in arriving at their decisions, Judge Prettyman, in the majority opinion, said:

> "Our conclusion is reached by such a balancing. In the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport under this regulation."

Nevertheless, proper use of the process of balancing conflicting interests requires that each particular interest shall be given its true weight and importance; and it is in this respect that *amicus* believes that the court below erred. Although at the outset of the opinion Judge Prettyman expands at length on the evil presented by the Communist movement, in his subsequent discussion of the right which he calls "the right to travel" he raises the question as to whether that right is protected by the Constitution, and then jumps to the conclusion that it is a "limited right" only.

Under the circumstances, it is hardly surprising that the majority of the court below decided that the public interest in overcoming the evil presented by the Communist movement far outweighed the Petitioners' "limited right to travel."

Amicus believes the problem should be considered in terms of a "right of free movement" rather than in terms of a "right to travel" because the former is a more comprehensive term. It avoids any possible construction that the right exists only for pleasure or in relation to foreign countries.

This right of free movement has always been recognized as an essential aspect of the American genius. More than

anything else it has distinguished us from the other peoples of the world. While in the past this right may have been chiefly related to movement within the United States, it surely needs no elaborate demonstration to show that with our position as an international power, it must cover movement throughout the world.

The right *affected* by Sections 51.135-51.143 of the Passport Regulations (Title 22 Code of Federal Regulations) is the right of free movement for any purpose and any destination. When the true nature of the right is recognized, its importance becomes self-evident.

The right of free movement is essential to the exercise of many important constitutional rights of American citizens. Take it away, and you confine the right of free speech, you eliminate the right of peaceable assembly, you nullify the guaranty against deprivation of life, liberty and property without due process of law.

Take it away, and you wipe out a proud distinction between the American citizen of the present and his less fortunate fellow human beings of both the present and the past; for the right of free movement is inseparably connected with American history and tradition.

It has been pointed out that our history is dominated by a continuous process of movement—by immigration, the movement of peoples from the Old World to the New, and by the frontier, the movement of American citizens and immigrants to the "West".*

It has even been claimed that in the frontier, or the Westward movement, lies the key to our culture, the explanation of our very special brand of rugged, individualistic democracy.** This theory has been disputed and

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* Arthur Meier Schlesinger, New Viewpoints in American History (1928), p. 2.

** Frederick Jackson Turner, The Frontier in American History (1921).

qualified, but the fact of movement, which the chief exponent of the theory recognized to be the outstanding feature of the frontier, cannot be gainsaid:

> "All was motion and change. A restlessness was universal. Men moved in their single life from Vermont to New York, from New York to Ohio, from Ohio to Wisconsin, from Wisconsin to California, and longed for the Hawaiian Islands. When the bark started from their fence rails, they felt the call to change. They were conscious of the mobility of their society and gloried in it." *

At the beginning of this century, it became popular to speak of the frontier as "vanishing" and it was commonly thought that the great movement that had characterized it had come to an end. The last decade, however, witnessed what has been described as "the largest westward movement in American history." ** The Pacific Coast states boasted population increases of 50%, with California emerging as the second most populous state in the Union. The Southern and Southwestern states also had a rapid population growth—particularly Florida, Arizona, Texas and Virginia.

Today, the movement has reversed itself. The flow is from the New World back to the Old, and one of our most popular magazines, in a very recent issue devoted exclusively to that subject, has referred to the world at large as "our new and vaster frontier", because of the millions of Americans who now live and travel abroad for business as well as pleasure. ***

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* Frederick Jackson Turner, The Frontier of American History (1921); pp. 354-355.

** Samuel Eliot Morison and Henry Steele Commager, The Growth of the American Republic (4th Ed., 1956); Vol. II, p. 783.

*** Life Magazine, Vol. 43 No. 26 (December 23, 1957) pp. 18-19.

This unending process of movement, however, would be of little or no significance if it had not left its mark indelibly stamped on our national character. It has been noted by virtually every social historian who has examined us as a people that, not only is movement our natural state, but the desire for movement—the "itch" to be "on the go" is our birthright:

> "The feeling an American dreads most is that of being 'stuck'—held fast in the mud of an environment where everything seems stagnant. In many areas of Europe and the Far East this has been men's destiny for centuries, but to an American it seems a violation of everything he has felt about life. The sensation of being trapped is the ultimate indignity. So he moves. And his moving keeps alive his sense of social possibility, the belief that something can happen; and as long as something can happen all is not lost." *

Amicus ventures to say that if the average American citizen were offered a choice between the right of free speech and the right of free movement, the right to express his views or to hear the views of others, in private or public, on politics, religion or any other subject, as contrasted to the right to take to the open road on foot or in his automobile, for business, pleasure or any other purpose, it is questionable which he would choose. The statement is not intended to be derogatory or even condescending. The question posed is a difficult one to answer. Which, really, is the more important right? Would either one survive for long without the other?

Unfortunately, rights are usually not recognized until such time and then only to such extent as they are called into question. Until today, therefore, the right of free movement has perhaps not received the full recognition

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* Max Lerner, America as a Civilization (1957), p. 100.

that it deserves. To say that a right has not received full recognition, however, is not to say that it is a "limited right".

As a matter of record, whenever the right of free movement has been challenged, it has not only been recognized and championed, it has been upheld in no uncertain terms.

When the British Sovereign, who was more interested in the exploitation of the wilderness by companies in which he had a direct financial interest, closed off that area to his American subjects, they objected to the limitation on the right of free movement, and listed it as one of their grievances in the Declaration of Independence:

> "He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriation of Lands."

After the War of Independence, when the newly established States began to assert the rights of the former Sovereign, the newly-declared American citizens express their concern for the right of free movement in Article IV of the Articles of Confederation:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States, in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively * * *."

In the Constitution, the same article appears in reduced form as Article IV, Section 2.

For the next hundred and fifty years, only three cases came before this Court which substantially involved the right of free movement.

The first such case, *Crandall* v. *Nevada*, 73 U. S. (6 Wall. 35), arose when the State of Nevada imposed a tax on every person leaving that state. This Court held the statute to be unconstitutional.

The second case arose when Georgia levied a tax on many occupations, including that of "immigrant agent." Although the majority of this Court did not find the statute invalid, they were sufficiently impressed by the argument that it endangered the right of free movement for Chief Justice Fuller to make the following comment (*Williams* v. *Fears*, 179 U. S. 270 [1900]):

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * *."

The third and last case, until the present ones, *Edwards* v. *California*, 314 U. S. 160 (1941), arose when California passed legislation to stop the "Okies." The majority of this Court found the legislation to be in conflict with the commerce clause of the Constitution. In his concurring opinion, however, Mr. Justice Douglas used the term "the right of free movement," and he described it as "a right of national citizenship" (314 U. S. 160, 181).

Today, in the cases now before this Court, the right of free movement meets its severest challenge. It must, therefore, be given its full measure of recognition. If, as *amicus* has argued, it is a right which is self-evident and inalienable, in the sense that it is an inseparable feature of our national character, if its existence is justified by logic, confirmed by history, and recognized

in the opinions of this Court in the few cases involving the right which have come before the Court, then *amicus* respectfully submits that it should be held by this Court to be as fully protected by the Constitution as any of the rights specifically enumerated therein.

In making this point, *amicus* relies not only on the argument that, because it is essential to the exercise of every important constitutional right of American citizens, the right of free movement is protected by the First and the Fifth Amendments; *amicus* relies also on the proposition that a right as fundamental and as firmly embedded in American history as the right of free movement is protected by the Ninth Amendment, even though it is not specifically enumerated in the Constitution or the Bill of Rights:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

This "Forgotten Amendment" has recently been analyzed, in the context of the historical period in which it was written, in a manner and to an extent that should forever lay to rest any doubts about its meaning.* It appears to have been added by James Madison to the Bill of Rights to overcome the argument, made by Alexander Hamilton in "The Federalist", that the enumeration of some rights in the Constitution might lead to a construction of that document which would deny the existence and importance of any right not specifically enumerated.

The right of free movement is just such a right.

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* Bennet B. Patterson; The Forgotten Ninth Amendment (1950).

POINT II

The action taken by the Secretary of State in and under Sections 51.135-51.143 represents an abuse of the power vested in the federal government in that it constitutes an invasion of the constitutional rights of American citizens which is justified neither by the gravity of the evil apparently intended to be overcome nor by the means employed to overcome it.

As already indicated, at the outset of the majority opinion of the court below, there is an extended discussion of the evil presented by the Communist movement. That the validity of every action taken by the federal government which relates to the Communist movement cannot be disposed of solely by reference to that movement in general terms is recognized by Judge Prettyman, who, in the court below, further defines the evil and specifies two dangers to which it may give rise in the field of foreign relations. First of all, he states, travel abroad by American citizens who are members or adherents of the Communist movement facilitates communication between them and their foreign comrades. Secondly, travel abroad by such citizens may create "international incidents which might arouse hostile activities" on the part of Communist countries.

If such is the nature of the evil, *amicus* protests that it is hardly grave enough to warrant the extreme action taken by the Secretary of State to overcome it. The first alleged danger is no danger at all, unless the facilitation of free speech is dangerous. Undoubtedly the ultimate results of facilitated communication between American citizens and their foreign comrades in the Communist movement might be harmful in some respects to the best interests of our country; but not the facilitated communication itself. Besides, such facilitated communication seems a matter of less concern to our national interests in the field of foreign rela-

tions, to be acted upon by the Secretary of State, than in the field of internal security.

As for the second alleged danger, *amicus* submits, in all due respect, that it is, to say the least, fanciful. The enemies of this country hardly need American citizens who are members or adherents of the Communist movement to create international incidents as an excuse for hostile activities. They have an overabundance of international incidents, they can manufacture such incidents when none exist, they do not really need any such incidents as an excuse for hostile activities.

In the concluding part of this brief, *amicus* will show that the responsibility for failing to provide an adequate definition of the evil under consideration in these cases rests not with the court below but with the Secretary of State, for promulgating Sections 51.135-51.143 of the Passport Regulations without any specific directive from Congress or the President. Here, however, *amicus* is concerned with the means which the Secretary of State employed to overcome whatever evil he believed to b confronting the nation in the field of foreign relations; and for that purpose *amicus* resorts once more to the *Dennis* case, and this time to the particular facts of that case.

In the *Dennis* case, this Court considered the constitutionality of an act of Congress, the Smith Act, which made it a crime knowingly and wilfully to advocate the overthrow of the federal government by force and violence. This Court scrutinized the statute very closely before it came to the conclusion that it was valid, and that the federal government had the power to punish a specific act actually committed with the clear intent to overthrow it by force and violence, because the proscribed act involved the exercise of the right of free speech.

More recently, in *Yates* v. *United States*, 354 U. S. 298 (1957), this Court considered the Smith Act once again.

This time, the Court was asked to determine whether a conviction under the statute was valid where the trial court refused to charge the jury that, in order to find the defendants guilty, they had to find that the defendants advocated forcible overthrow of the federal government as an incitement to action, not merely as an abstract doctrine.

In the opinion, Mr. Justice Harlan emphasized the distinction made in prior cases between the two types of advocacy, but avoided any constitutional question based on such distinction by construing the Smith Act as punishing advocacy only when intended as an incitement to action.

From the decisions of this Court in the *Dennis* and the *Yates* cases, *amicus* believes that every action taken by the federal government or any state government which affects a constitutional right of American citizens will be scrutinized to determine whether the action relates strictly to a proper purpose and affects the constitutional right only to the extent necessary to attain that purpose.

In the present cases, the Court is considering the constitutionality of regulations promulgated by the Secretary of State which enable him to prevent American citizens who fall within certain classifications from travelling abroad.

The American citizens in question are: (1) members of the Communist Party; (2) former members who continue to act "in furtherance of the interests and under the discipline of" that Party; (3) persons who engage in activities "as a result of direction, domination or control exercised over them by the Communist movement"; and (4) persons as to whom there is reason to believe that they are going abroad to engage in activities "for the purpose, knowingly and wilfully of advancing that movement."

As pointed out in the dissenting opinion of Judge Bazelon in the court below and in the brief of the petitioners' attorney, there is grave doubt that the regulations of the Secretary of State under consideration are sanctioned by

any act of Congress or the President, or by a power delegated to or inherent in either the legislative or executive branch of the federal government. For the purposes of the point which *amicus* now urges upon this Court, however, we will assume that the regulations under consideration can be given the same weight as if incorporated in an act of Congress, like the Smith Act, for example. Even if they are given such weight, *amicus* submits that the regulations must be struck down as an extreme abuse of the power vested in the federal government.

In the Smith Act, Congress undertook to invade the province of free speech to the extent necessary to curb actual advocacy of violent revolution, by punishment of an act of advocacy after it had been committed. Under Sections 51.135-51.143 of the Passport Regulations, the Secretary of States invades the province of free movement and eliminates an entire area of such movement, that of travel abroad, to curb possible interference with the conduct of foreign relations, by prior restraint, based on membership in or association with the Communist Party or the international Communist movement.

The sole standard by which an American citizen is granted or denied a passport under Sections 51.135-51.143 is membership in or association with Communist organizations. The citizen may have engaged in entirely legal and even beneficial activities. He may be denied a passport, however, if he engaged in those activities as a member of, or in some other association with, a Communist organization.

The case of Dr. Briehl is an example. This Petitioner was refused a passport in 1955 for the stated reasons that he was (1) alleged to have been a member of the Communist Party in 1936; (2) a member of two other allegedly Communist organizations at an unspecified date; (3) a "contact" of two more allegedly Communist organizations, also at an unspecified date; (4) the author of an inoffensive

article which appeared in a "Communist publication," also at an unspecified date; (5) a sponsor of an entirely legal campaign to present a petition to the President, conducted, however, by an allegedly Communist organization; and (6) a contributor to an entirely legal bail fund, also conducted by an allegedly Communist organization on behalf of leaders of the Communist Party.

The special vice of Section 51.135 is that of any statute or ordinance requiring an American citizen to obtain a "permit" as a prerequisite to the exercise of a constitutional right. *Saia* v. *New York*, 334 U. S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Burstyn* v. *Wilson*, 343 U. S. 495 (1952); *Staub* v. *Baxley*, 355 U. S. —, 26 L. Wk. 4079 (decided January 13, 1958).

In the cases now before this Court the "permit" is the passport, and the right is the right of free movement. All of the vicious characteristics remain—the prior, absolute restraint, the vague and indefinite standards for issuing the permit, and the application of those standards by an administrative official vested with an almost unlimited discretion.

Of the cases cited above, the *Burstyn* case is particularly in point. In that case this Court reviewed a New York statute which required any person wishing to exhibit a motion picture in public to obtain a permit from a censor who was authorized to deny the permit if the motion picture was, among other things, "sacrilegious."

Mr. Justice Clark, speaking for a unanimous court, pointed out that the statute raised a very serious question under the constitutional guarantee of separate church and state with freedom of worship for all in that the application of the "sacrilegious" test would involve the state government in the defense of particular religious doctrines. He avoided that particular constitutional question, and condemned the statute as an invalid prior restraint on freedom of speech.

The main difference between the statute in the *Burstyn* case and Section 51.135 would seem to be that, in place of the word "sacrilegious", there is the word "Communist", *i.e.*, "Communist" in the broader sense of member or adherent of the Communist movement, as contrasted to card-carrying members of the Communist Party, U. S. A. In the *Burstyn* case, however, the "sacrilegious" test was at least sanctioned by an act of the State legislature. The "Communist" test is not sanctioned by any act of any branch of the federal government.

Conclusion

Amicus reverts, briefly, to a point which it has intentionally passed by. It has referred repeatedly to the process of balancing conflicting interests, but, in doing so, it is forced to admit that it has little or no guidance in evaluating certain of the conflicting interests except its own predilections.

In his concurring opinion in the *Dennis* case, Mr. Justice Frankfurter pointed up the dilemma (341 U. S. 525):

> "But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

"Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress."

Amicus points out that the fact remains that on the subject matter of Sections 51.135-51.143, Congress has not spoken. To the extent, therefore, that *he* has spoken—and acted in the premises—the Secretary of State has done so hastily, and he should, in view of the effect of his action on an important constitutional right of American citizens, be held to have acted improperly.

Respectfully submitted,

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